

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LINDA RECKER and LINDA ZAHRN,

Plaintiffs-Appellants,

v

DAVID MALSON, MICHAEL DUNN, DUNN,  
MALSON & KOZERA, P.C., and SEAN  
FITZGERALD,

Defendants-Appellees.

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UNPUBLISHED

August 17, 2006

No. 268230

Kent Circuit Court

LC No. 03-004250-NM

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

In this legal malpractice case, plaintiffs appeal as of right from the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs were part of a group of nurses who sued their employer Butterworth Hospital. The nurses were working under a plan known as "the Baylor plan," which was designed to secure a competent, experienced nursing staff to work weekend shifts. After the hospital unilaterally changed the plan, the nurses sued for breach of contract. Defendants represented the nurses in that litigation. The nurses prevailed at the liability phase of a trial. In lieu of proceeding to a trial on damages, the nurses unanimously agreed to accept a settlement offered by the hospital. Plaintiffs then filed this action against defendants for legal malpractice. They alleged they were just-cause employees while other nurses were at-will employees, and it was a conflict of interest for defendants to represent both groups of nurses. They claimed defendants committed malpractice by waiving an opportunity to amend the pleadings to allege plaintiffs' just-cause status, and negotiating a settlement more advantageous to the at-will nurses but inadequate regarding interests of just-cause employees. Plaintiffs also alleged defendants pressured them into accepting the settlement, and defendants were motivated because of financial difficulties rather than their clients' interests.

Defendants moved for summary disposition alleging plaintiffs could not prove that any breach of the standard of care proximately caused plaintiffs' alleged damages. They also argued

their decisions in the underlying litigation fell within the attorney-judgment rule and, therefore, were not actionable. The trial court agreed that plaintiffs could not prove proximate cause and granted defendants' motion.<sup>1</sup>

We review a trial court's decision on a summary disposition motion de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim; a court must consider the submitted admissible evidence to determine whether a genuine issue of material fact exists that would preclude granting the moving party judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). The elements of a legal malpractice claim are: (1) an attorney-client relationship; (2) negligent legal representation; (3) the proximate cause between the negligence and an injury; and (4) the fact and extent of the claimed injury. *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004).

[T]o establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff must show that, but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the "suit within a suit" requirement in legal malpractice cases. [*Id.*]

Proximate cause is generally a question of fact for the jury. *Teodorescu v Bushnell, Gage, Reizen & Byington (On Remand)*, 201 Mich App 260, 266; 506 NW2d 275 (1993). Although proximate cause involves both a legal and factual component, this case focuses on whether plaintiffs can factually prove causation without relying on speculation or conjecture. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586-587 n 13; 513 NW2d 773 (1994).

Plaintiffs' principal theory of liability was that defendants failed to adequately represent their interests by waiving plaintiffs' right to allege their status as just-cause employees; plaintiffs maintain this affected the amount of future damages they could have recovered had the case proceeded to trial. We disagree.

While defendants initially alleged that all the nurses were at-will employees and declined to amend the pleadings to allege plaintiffs' just-cause status when informed by the trial court they would have to adjourn the scheduled trial date if they did so, their conduct did not affect plaintiffs' ability to recover the damages sought in light of a ruling by the court in the underlying litigation. In the underlying litigation, the court addressed several motions brought by the hospital to limit damages. The judge agreed that the nurses who had left the Baylor plan could

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<sup>1</sup> We initially address defendants' claims that plaintiffs improperly expanded the record on appeal. Our review of the trial court record discloses that several documents included within plaintiffs' appendix were not submitted to the trial court. This Court's review is limited to the record established in the trial court, and a party may not expand the record on appeal. *Sherman v Sea Ray Boats, Inc.*, 251 Mich App 41, 56; 649 NW2d 783 (2002); *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994). Accordingly, we decline to consider those documents not submitted at the trial court level.

not receive future damages but held that nurses who were still employed under the Baylor plan, which included both plaintiffs here, would be entitled to recover future damages. Thus, even though the pleadings were not amended to allege plaintiffs' just-cause status, plaintiffs would have been allowed to seek as damages the premium pay they were promised under the Baylor Plan.

Although plaintiffs argue that they would have been automatically entitled to future damages until their retirement had defendants amended the complaint to add the just-cause theory, they cite no authority for this proposition. In fact, future damages are generally available at the court's discretion only if reinstatement is not feasible. See *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188, 200-201; 390 NW2d 227 (1986). While future damages may be awarded based on a party's just-cause status, whether they are recoverable in a specific case will depend on the facts. Cf. *Ritchie v Michigan Consolidated Gas Co*, 163 Mich App 358, 374; 413 NW2d 796 (1987). Because plaintiffs continue to be employed by the hospital, we find no basis for plaintiffs' claim that they would have automatically been entitled to future damages until retirement age. Regardless, the court in the underlying litigation ruled that plaintiffs could recover future damages at trial even though they were not identified as just-cause employees in the pleadings. In light of this ruling, defendants' failure to amend the pleadings did not proximately cause plaintiffs' alleged damages.

Plaintiffs also argue that defendants did not adequately represent their interests because of several conflicts of interest. In considering this issue, we first address defendants' argument that the Michigan Rules of Professional Conduct cannot form the basis for plaintiffs' conflict-of-interest claims. MRPC 1.0(b) provides:

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.

Although a violation of a rule cannot "give rise" to a cause of action for enforcement or for damages caused by a failure to comply, *Watts v Polaczek*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000), plaintiffs here do not rely solely on the rules to establish their claim, but instead refer to the rules only as evidence of the standard of care. This is consistent with MRPC 1.0(b), which contemplates that a rule is otherwise admissible as evidence in civil proceedings. Plaintiffs rely on MRPC 1.7(b) and 1.8(g) to support their argument that it was a conflict of interest for defendants to represent all the nurses as one group where the nurses' interests differed depending on whether they were at-will employees or just-cause employees. Plaintiffs maintain that the ultimate settlement with the hospital favored the at-will employee nurses who no longer worked under the Baylor plan because most of the settlement amount was allocated for back pay not future damages, and defendants failed to adequately represent plaintiffs' interests as just-cause employees.

Assuming for the sake of argument that a conflict of interest existed, plaintiffs cannot establish proximate cause in light of the evidence that they (1) were aware of the terms and effect of the settlement, (2) consulted independent experts before accepting the settlement, and (3)

voluntarily accepted the settlement. Although plaintiffs claimed they felt pressured to accept the settlement, it was undisputed that they consulted with an accountant and another attorney before deciding whether to accept the offer. In addition, the judge in the underlying litigation met with plaintiffs to address their questions about the settlement terms. Plaintiffs were advised by an independent attorney not to accept the offer because it did not adequately compensate them for future damages, but they ultimately agreed to accept the settlement. Because they made an informed and voluntary decision to accept the agreement knowing their claim for future damages might have been compromised, plaintiffs cannot establish that defendants' alleged conflict of interest was the proximate cause of their alleged damages.

Next, plaintiffs rely on MRPC 1.7(b) to support their argument that a conflict of interest existed because defendant law firm was experiencing financial difficulties. Plaintiffs contend defendants placed their own financial interests above plaintiffs' interests in negotiating the settlement and recommending that plaintiffs accept the settlement offer. Even if there is merit to plaintiffs' claim that the law firm was experiencing financial difficulties, for the reasons previously discussed, plaintiffs have not shown that they were improperly influenced by defendants to accept the settlement agreement.

In sum, defendants were entitled to summary disposition because plaintiffs failed to show that defendants' alleged malpractice proximately caused plaintiffs' alleged damages.<sup>2</sup>

Affirmed.

/s/ Brian K. Zahra  
/s/ Janet T. Neff  
/s/ Donald S. Owens

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<sup>2</sup> In light of our decision, it is unnecessary to consider plaintiffs' arguments concerning the attorney-judgment rule, an issue that was neither addressed nor decided by the trial court.